SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 308

SCOTT M. LOFTIN AND WM. R. KENAN, JR., AS RECEIVERS OF THE FLORIDA EAST COAST RAILWAY COMPANY,
Petitioners,

vs.

CROWLEY'S, INC., A FLORIDA CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA AND SUPPORTING BRIEF.

RUSSELL L. FRINK,
ROBERT H. ANDERSON,
Counsel for Petitioners.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Summary statement of the matter involved	1
Jurisdictional statement	2
Question presented	4
Reasons relied on for the allowance of the writ	5
Prayer for writ	7
Brief in support of petition	8

Table of Cases Cited.

Atlantic Coast Line Ry. Co. v. *Coachman*, 59 Fla. 130, 52 Sou. 377	5
Atlantic Coast Line Ry. v. *Ivey*, 148 Fla. —, 5 Sou. (2d) 244	6, 11
Carter v. *J. Ray Arnold Lbr. Co.*, 83 Fla. 470, 91 Sou. 893.	9
Crenshaw Bros. v. *Harper*, 142 Fla. 27, 194 Sou. 353	6, 10
General Outdoor Advertising Co. v. *Frost*, 76 F. (2d) 127	9
Grace v. *Geneva Lumber Co.*, 71 Fla. 31, 70 Sou. 774	10
Hayes v. *Walker*, 54 Fla. 163, 44 Sou. 747	5
Loftin v. *Crowley's, Inc.*, 8 So. (2d) 909	4
N. C. & St. L. Ry. v. *Walters*, 294 U. S. 495, 55 Sup. Ct. 486, 79 L. Ed. 949	6, 10
Seaboard Airline Ry. v. *Watson*, 103 Fla. 477, 137 Sou. 719	5
Seaboard Airline Ry. v. *Watson*, 287 U. S. 86, 53 Sup. Ct. 32, 77 L. Ed. 180, 86 A. L. R. 174	6
Southern Cotton Oil Co. v. *Anderson*, 80 Fla. 735, 86 Sou. 629	10

Statutes Cited.

Constitution of the United States, Amendment XIV	3
Florida—Compiled General Laws of 1927, Section 7051	5
Florida—Compiled General Laws of 1927, Section 7052	5
Judicial Code, Sec. 237, as amended	3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 308

SCOTT M. LOFTIN AND WM. R. KENAN, JR., AS RECEIVERS OF THE FLORIDA EAST COAST RAILWAY COMPANY,
Petitioners,

vs.

CROWLEY'S, INC., A FLORIDA CORPORATION.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

The petition of Scott M. Loftin and Wm. R. Kenan, Jr., as Receivers of the Florida East Coast Railway Company, for a writ of certiorari to the Supreme Court of Florida to review the judgment entered by it affirming the judgment of the Circuit Court of Dade County, Florida, in a cause therein lately pending, wherein Crowley's, Inc., was plaintiff and petitioners were defendants, alleges:

I.

Summary Statement of the Matter.

Petitioners are the Receivers of the Florida East Coast Railway Company, duly appointed by the District Court

of the United States for the Southern District of Florida, in an equity cause therein pending, by an order directing them to take charge of and operate the system of transportation of the Florida East Coast Railway Company.

Florida East Coast Railway Company is a common carrier by railroad, in interstate and intrastate commerce, between Jacksonville, Florida, and Miami, Florida.

On March 31, 1941, the respondent Crowley's, Inc., brought an action at law in the Circuit Court of Dade County (Miami), Florida, against the Receivers to recover damages alleged to have resulted to a motor truck and trailer (and the cargo) from the negligent operation of a switch engine, on January 2, 1940, when it struck the truck and trailer at a grade crossing at Northwest Seventh Avenue on what was known as the "Hialeah Belt" in the Miami terminals of the Florida East Coast Railway.

The declaration was in the conventional form. The defendants filed pleas of, (1) not guilty,[1] and (2) contributory negligence. The case was tried to a jury. The undisputed evidence of the plaintiffs showed damages of approximately $12,500. It was proved that a portion of the damages was covered by insurance for which Crowley's had received $7600 from the United Mutual Fire Insurance Company. The jury rendered a verdict for the plaintiffs in the sum of $3550—or half the amount paid by the insurance company—for which judgment was entered.

The Receivers appealed to the Supreme Court of Florida. On June 23, 1942, the judgment was affirmed by that Court (R. 212).

II.

Jurisdictional Statement.

The statutory provision upon which it is contended that this Court has jurisdiction to review the judgment in ques-

---

[1] Under the state practice this plea denied the wrongful act and the damages.

tion is § 237 of the Judicial Code, as amended (United States Code, 1940 Edition, Title 28, Chapter 9, § 344) wherein it is provided:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, * * * any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had * * * where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution * * * of the United States; or where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution of * * * the United States."[2]

In this case the plaintiff in the trial court (respondent here) relied upon two Florida statutes, the one (§ 7051, C. G. L. 1927) providing that railroads shall be liable for damage done by the operation of their trains unless they make it appear that they exercised due care, and creating a presumption of negligence against them, and the other (§ 7052) establishing the comparative negligence rule in actions against railroads. The defendants (petitioners here) objected to charges to the jury, by the trial judge, predicated upon these statutes, upon the ground that they were repugnant to the Constitution of the United States (Amendment XIV). The trial judge gave the charges.

On appeal, after the rendition of judgment for the plaintiff, the giving of these charges was assigned as error in the Supreme Court of Florida, but that Court upheld the validity of the statutes upon which the charges were based, approved the giving of the charges, and affirmed the judgment of the Dade County Court.

---

[2] An appeal would lie also under Title 28, § 344(a).

The date of the judgment of the Supreme Court of Florida sought to be reviewd is June 23, 1942 (R. 212). *Loftin et al.* v. *Crowley's, Inc.*, 8 So. (2d) 909.

On July 6, 1942, the Supreme Court of Florida stayed the execution and enforcement of its judgment for ninety days to enable petitioners to apply for a writ of certiorari to this Court and withheld its mandate for that period (R. 213).

The opinion of the Supreme Court of Florida affirming the judgment of the Circuit Court of Dade County will be found on pages 205-211 of the certified copy of the record filed herein.

The date on which this petition for a writ of certiorari, the supporting brief, and the record were filed with the Supreme Court of the United States is August 1, 1942.

III.

Question Presented.

The question presented by this application is:

> "Do Sections 7051 and 7052, Compiled General Laws, 1927 (of Florida), enacted more than fifty years ago, offend against the Constitution of the United States in that they deny to the operators of railroad trains the equal protection of the laws afforded to operators of motor vehicles, both agencies having been declared by the Florida court to be dangerous instrumentalities, and the dangers incident to hazardous operations having been declared by it to be the basis of the classification upon which such statutory liability was predicated?"

It was so recognized by the Supreme Court of Florida (R. 206).

IV.

Reasons Relied On for the Allowance of the Writ.

For more than fifty years there have been in force in the State of Florida, Sections 7051 and 7052, Compiled General Laws of 1927, which provide:

> "7051. (4964). *Liability of railroad company*—A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives or cars, or other machinery of such company, or for damage done by any person in the employ and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company. (Ch. 4071, Acts 1891, § 1.)"

> "7052. (4965.) *When recovery of damages forbidden.* No person shall recover damages from a railroad company for injury to himself, or his property, where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him. (Id. § 2.)"

The constitutionality of these statutes has been upheld repeatedly by the Florida court of last resort.

Atlantic Coast Line Ry. Co. v. *Coachman* (1910), 59 Fla. 130, 52 Sou. 377;

Hayes v. *Walker* (1907), 54 Fla. 163, 44 Sou. 747;

Seaboard Airline Railway v. *Watson* (1931), 103 Fla. 477, 137 Sou. 719.

The last cited case was appealed to this Court but the appeal was dismissed for want of a substantial federal question.[3]

Seaboard Airline Railway v. *Watson* (1932), 287 U. S. 86, 53 Sup. Ct. 32, 77 L. Ed. 180, 86 A. L. R. 174.

Since those decisions, however, both this Court and the Supreme Court of Florida have held that statutes, though valid when enacted under conditions existing at that time, may become invalid by reason of changed conditions that deny the equal protection of the laws.

N., C. & St. L. Railway v. *Walters* (1935), 294 U. S. 495, 55 S. Ct. 486, 79 L. Ed. 949;

Atlantic Coast Line Railway v. *Ivey* (1941), 148 Fla. —, 5 Sou. (2d) 244.

Upon the reasoning of these cases, the petitioners contend that these statutes have become unconstitutional even though they were valid when enacted. The Florida Court sustained the statutory classification as to railroads because of their dangerous character. It has held that motor vehicles have become not only as dangerous but more so. Therefore, in a suit growing out of a collision between a railroad train and a motor vehicle the statutes imposing an arbitrary presumption of negligence upon the *less dangerous instrumentality* and depriving the railroad of the defense of contributory negligence deny it the equal protection of the laws and deprive it of its property without due process of law in violation of Article XIV of the Amendments to the Constitution of the United States.

---

[3] The *Watson* case, however, involving a collision between a railroad train and a mule team, clearly is distinguishable from the case at bar involving a collision between a railroad train and a motor vehicle that has been described by the Florida Supreme Court as "the most deadly machine in America."

Crenshaw Bros. v. *Harper* (1940), 142 Fla. 27, 194 Sou. 353.

In accordance with the rules of this Court, a concise memorandum is filed herein in support of this petition.

WHEREFORE, your petitioners pray that a writ of certiorari be issued to the Supreme Court of Florida commanding it to transmit the record of its judgment of June 23, 1942 affirming the judgment of the Circuit Court of Dade County, Florida, in the cause styled "Scott M. Loftin and Wm. R. Kenan, Jr., as Receivers of the Florida East Coast Railway Company, Plaintiffs-in-error vs. Crowleys, Inc., a Florida corporation, Defendant-in-error," for review and determination herein.

Miami, Florida, this 1st day of August, 1942.

RUSSELL L. FRINK,
ROBERT H. ANDERSON,
Attorneys for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

At the trial of this cause, the evidence showed that the plaintiff in the court below was engaged in the transportation of dairy products in interstate commerce and their distribution to the retail trade in Miami.

At the time the plaintiff's truck and trailer were struck by the defendants' switch engine, they were coming into Miami from Binghamton, New York, loaded with dairy products intended for the retail trade.

The defendants were engaged in the transportation of goods and passengers by railroad in interstate and intrastate commerce.

At the time their switch engine collided with the plaintiff's truck and trailer, it was returning from the delivery of a car on an industrial track of a consignee.

Therefore, the parties were engaged in identically the same business and, in their operations, each used heavy self-propelled vehicles.

The railroad operated its equipment on its own tracks but across public highways. The plaintiff operated its equipment upon public highways where it came in contact with vehicles driven by the public generally.

The defendants were operating the switch engine in conformity with law. The plaintiff's truck (weighing 42,000 pounds with cargo) was being operated in violation of State statutes that restricted the rate of speed of vehicles of that size and weight in cities and towns.

In spite of the fact that the parties were engaged in exactly the same kind of business, that they used like instrumentalities in their businesses and their methods of operation were similar in all substantial respects, when the two vehicles came together, the statutes under attack created a presumption that the railroad was negligent from the

sheer fact that its train collide led with the truck. There was
no presumption against the p plaintiff.

And the statute further prov vided that if both parties were
at fault, that is to say, that if th the plaintiff were guilty of con-
tributory negligence, it could s still recover but its damages
would be diminished in propor rtion to its fault.

If the procedural situation ha had been reversed and the rail-
road had sued the truck line fo for the damage to its locomo-
tive, there would have been no o presumption that the truck
line was negligent. It would ha have been a matter of affirma-
tive proof on the part of the pla plaintiff as in other civil cases.
And furthermore, in such a cas ase, if the evidence had shown
that the plaintiff-railroad was s guilty of any contributory
negligence, however slight, it v would have barred recovery
absolutely.

Carter v. *J. Ray Arnold L Lbr. Co.* (1922), 83 Fla. 470,
91 Sou. 893;

General Outdoor Advertisi ising Co. v. *Frost* (1935), (C.
C. A. 5th), 76 F. (2d) 127 27.

If a pedestrian standing at or or near the crossing had been
injured when this collision oc occurred he could have sued
the railroad and the motor carr rrier as joint tortfeasors in a
single action. If his evidence e merely disclosed the fact of
his injury and nothing more, the he motor carrier would be dis-
charged under a directed verdic dict, but the co-defendant rail-
road would have to overcome th the presumption of negligence
or suffer a verdict against it. t.

If the evidence disclosed tha hat the pedestrian negligently
contributed to his injuries, the e motor carrier would still be
entitled to a directed verdict i t in its favor, while the rail-
road would be liable.

In the instant case, the verd erdict of the jury clearly evi-
dences its conclusion that the m motor carrier was two-thirds
to blame for the accident. (T (The challenged statute calls

for diminution of damages in the proportion that the plaintiff's negligence bears to the combined negligence of both parties.) Therefore, without the aid of the statute, the motor carrier could have recovered nothing.

The Supreme Court of Florida has held repeatedly that the constitutional basis for discriminating against railroads by these statutes was the dangerous character of the business conducted by them.

Grace v. *Geneva Lumber Company* (1916), 71 Fla. 31, 70 Sou. 774.

Having first recognized that an automobile is more dangerous than a railroad train because the latter moves along the path fixed by its rails, while the course of the automobile cannot be forecast,

Southern Cotton Oil Co. v. *Anderson* (1920), 80 Fla. 735, 86 Sou. 629

the Florida Court finally committed itself to the proposition that the automobile was the most deadly machine in America.

Crenshaw Brothers Produce Co. v. *Harper* (1940), 142 Fla. 27, 194 Sou. 353.

This Court has said that the railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transportation.

N., C. & St. L. Railway v. *Walters* (1935), 294 U. S. 405, 55 Sup. Ct. 486, 79 L. Ed. 949.

The Court thereupon held that a statute of Tennessee, authorizing the imposition upon railroads of part of the expense of constructing an underpass at a grade crossing, although valid when enacted and admittedly to promote public safety, had become invalid by change in the conditions to which it applied.

On December 2, 1941 the Supreme Court of Florida declared invalid a statute (passed in 1899) requiring railroads to fence rights of way under penalty of double damages for the killing of livestock. It followed the decision of this Court in the *Walters* case, *supra,* and upon its authority held the statute unconstitutional by reason of changed conditions. The Court pointed to the manifest discrimination of not only penalizing the railroad with double damages but, in addition, forcing it to defend under the burden of a presumption of negligence, whereas a motor carrier killing the same cow in the same locality was subject to neither penalty nor presumption. It said there could be no question but that motor carriers and railroads were under like duties to the public and had like obligations to protect against accidents arising out of their operations.

Atlantic Coast Line R. v. *Ivey,* 148 Fla. —, 5 Sou. (2d) 244.

It is impossible to reconcile that holding with that in the case at bar.

In the instant case, the trial judge, based on the statutes under attack, told the jury that the railroad was presumed to be negligent unless it made it appear affirmatively that it had exercised all ordinary and reasonable care and diligence and, in the absence of such showing on the part of the railroad, it should find for the plaintiff.

His Honor further told the jury that even though it found that the plaintiff's employees were guilty of negligence and that their negligence proximately contributed to the plaintiff's loss, nonetheless it was authorized to find for the plaintiff (unless the defendant made it appear affirmatively that it had exercised all ordinary care) but that the amount of the verdict should be diminished in proportion to the fault attributable to each.

In these circumstances, it was expecting too much for a lay jury to do other than it did.

The jury must have found that the railroad did not meet the burden that the court put upon it. It clearly found that the driver of the truck was primarily responsible; otherwise, there was no occasion for reducing the damages by two-thirds.

The railroad objected to these charges upon the ground that the statutes upon which they were predicated were repugnant to the Constitution of the United States. On appeal, after the rendition of judgment for the motor carrier, the giving of these charges was assigned as error in the Supreme Court of Florida, but that Court upheld the validity of the statutes upon which the charges were based, approved the giving of the charges, and affirmed the judgment of the Dade County Court.

The statutes clearly deny the petitioners the equal protection of the laws and deprive them of their property without due process of law in violation of Article XIV of the Amendments to the Constitution of the United States and the Supreme Court of Florida should have so found and reversed the Circuit Court of Dade County.

Respectfully,

RUSSELL L. FRINK,
ROBERT H. ANDERSON,
Counsel for Petitioners.